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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-184

PATRICK J. LUCEY, et al.,
Petitioner,

v.

THOMAS E. LISTER, et al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX AND SYNOPSIS OF ARGUMENT

Page

OPINIONS BELOW 1

JURISDICTION 2

WISCONSIN STATUTE INVOLVED 2

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING CERTIORARI 7

I. The Decision Below Conflicts With Decisions Of This Court 7

II. The Lower Court Decided An Important Question Of Federal Law Which Has Not Been But Should Be Settled By This Court 12

III. The Decision Below Interferes With Public Policy Of Wisconsin 12

IV. Effect Of Decision Below Is Undesirable 13

V. Eleventh Amendment And Executive Immunity 14

VI. Dismissal Was Not An Abuse Of Discretion 15

CONCLUSION 16

Page

CASES CITED

Baggett v. Bullitt,
377 U.S. 360 (1964) 10

Bellotti v. Baird,
428 U.S. 132 (1976) 8, 10

Burford v. Sun Oil Co.,
319 U.S. 315 (1943) 12

Edelman v. Jordan,
415 U.S. 651 (1974) 14

England v. Medical Examiners,
375 U.S. 411 (1964) 8, 10

Government and Civil Emp. Org. Com. CIO v. Windsor,
353 U.S. 364 (1957) 11

Griffin, et al. v. County School Board of Prince Edward County, et al.,
377 U.S. 218 (1964) 10

Link v. Wabash Railroad Co.,
370 U.S. 626 (1962) 15

Lister v. Board of Regents,
72 Wis.2d 282, 240 N.W.2d 610 (1976) 5

Louisiana Power and Light Co. v. Thibodeaux,
360 U.S. 25 (1959) 13

Page

National Hockey League v. Metro Hockey Club, Inc.,
427 U.S. 639 (1976) 15

Scheuer v. Rhodes,
416 U.S. 232 (1974) 15

United States Life Ins. Co. v. Delaney,
328 F.2d 483 (5th Cir. 1964),
cert. denied 377 U.S. 935 12

UNITED STATES CONSTITUTION

Eleventh Amendment 14

STATUTES AND RULES CITED

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 4

Rule 41(b),
Federal Rules of Civil Procedure 15

Wisconsin Statutes

Sec. 36.16 ..... 2, 4

285.01 ..... 5, 6, 8

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The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 4, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals appears in the Appendix hereto. The relevant opinions of the District Court for the Western District of Wisconsin also appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 4, 1972. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

WISCONSIN STATUTE INVOLVED

Pertinent parts of sec. 36.16, Wis. Stats., are found in the opinion of the Court of Appeals (Appendix, p. 101-104).

QUESTIONS PRESENTED

1. Is it an abuse of discretion for a federal court to refuse to vacate an order of abstention at the request of a party who has caused delay in seeking a state court interpretation of an allegedly unconstitutional statute by choosing a type of proceeding that would require action by an administrative body and the state Legislature prior to court action?

The Court of Appeals held in the affirmative.

2. Is it an abuse of discretion for a federal court to dismiss the action where no adjudication of the state issues has been obtained by plaintiffs in more than three years and the delay has been caused by the plaintiffs' choice of course of litigation within the state system?

The Court of Appeals held in the affirmative.

STATEMENT OF THE CASE

This action was commenced in the Western District of Wisconsin over six and one-half years ago by four students at the University of Wisconsin Law School who had been classified as nonresidents for tuition purposes. Their Complaint under 42 U.S.C. § 1983 challenged sec. 36.16 of the Wisconsin Statutes as being unconstitutional on its face because it in part granted resident status to resident women who are "wives of resident working husbands, but not to resident men who are husbands of resident working wives," and unconstitutional as interpreted by the defendant officials because it was being construed so as to create an irrebuttable presumption of nonresidency for such students who commenced their studies shortly after establishing residency in the State of Wisconsin.

On July 11, 1973, the district judge concluded that the gravamen of the plaintiffs' federal claims could be substantially altered or obviated altogether if a state court would resolve two issues of state law: First, whether the statute creates an irrebuttable presumption against resident classification for students coming to Wisconsin principally for their education; and secondly, whether the statute authorizes different treatment for males married to female residents than for females married to male residents. The court concluded in part:

> "* * * I conclude that abstention is warranted despite the cost and delay which may result from plaintiffs repairing to the state courts." (Appendix, p. 137)

The district court retained jurisdiction of the action pending resolution in the state court of the assertedly

unclear issues of state law. The respondents herein did not appeal the order for Pullman-type abstention, but rather commenced an action in the Circuit Court for Dane County, Wisconsin, against the Board of Regents and Thomas H. Hoover, Registrar at the Madison campus. Instead of limiting that lawsuit to the issues specified in the district judge's order of July 11, 1973, the Complaint included an action for money had and received in the amounts claimed to be due the students for nonresident tuition previously paid. Because of this claim for money, the provisions of sec. 285.01 of the Wisconsin Statutes dealing with money claims against the state were brought into play by the plaintiffs in that action. The defendants demurred and the court sustained the demur holding that the action was primarily one for money and that the proper procedure was to follow the dictates of sec. 285.01, Wis. Stats., regarding claims against a state agency. The court refused declaratory judgment on the ground that since the plaintiffs were no longer students, there was no justiciable controversy calling for a declaratory judgment by the court. The Supreme Court affirmed the Circuit Court dismissal and noted that even though it had inherent authority to grant declaratory relief, it would not do so until the claims had been acted upon as required by sec. 285.01.

After the Wisconsin Supreme Court opinion in *Lister v. Board of Regents*, 72 Wis. 2d 282, 240 N.W. 2d 610 (1976), the plaintiffs moved that the abstention order be vacated. On July 30, 1976, the district court dismissed the action on its own motion noting that the plaintiffs were quickly advised in the state court that "they had chosen the wrong course within the state system." The court further explained that the reasons for abstention were undiminished, and therefore concluded that "three

years has been sufficient time within which to retain jurisdiction in this court awaiting state adjudication of state issues, and that plaintiffs must accept responsibility for their choice of a course of litigation within the state system."

Thereafter, the district court denied plaintiffs' motion seeking reconsideration and an appeal was then filed with the Seventh Circuit Court of Appeals from the judgment dismissing the Complaint. Claims were filed with the Claims Board where they were denied and with the Wisconsin Legislature where they were denied on November 14, 1977. Although the claimants are now eligible to file suit under sec. 285.01, Wis. Stats., they have not done so.

On May 4, 1978, the Court of Appeals for the Seventh Circuit concluded that abstention was no longer appropriate, and therefore, reversed the order of July 30, 1976, dismissing the action as a whole and directed the district court to hear the merits of the damage claims. The court held that a federal court that orders abstention to obtain clarifying interpretations of state law should not wait until the federal litigant pursues state nonjudicial remedies, such as a claim to the Legislature involved in this case, if the state courts refuse to clarify the law until those nonjudicial remedies are pursued.

Further facts are stated in the petition and in the opinion of the United States Court of Appeals to the Seventh Circuit and the United States District Court for the Western District of Wisconsin contained in the Appendix.

REASONS FOR GRANTING CERTIORARI

I. The Decision Below Conflicts With Decisions Of This Court.

The record is clear that when the plaintiffs brought their action in the Circuit Court of Dane County in September of 1973 the action exceeded the directions of the district court that the plaintiffs seek a clarification of two issues of state law, whether the statute created an irrebuttable presumption and whether the statute authorized different treatment for males married to female residents than for females married to male residents. This mission could have been accomplished by a simple action for declaratory judgment. However, instead the plaintiffs joined a cause of action for money had and received, and sought judgment ordering the defendant Board of Regents to refund the amounts alleged to have been unlawfully collected and a judgment imposing personal liability for those amounts on the University Registrar.

It was this attempt to collect the money alleged due from a state agency and a state officer that brought the plaintiffs into the jurisdiction of the Claims Board and the Legislature. It was their choice to include in their Complaint a demand for this money. Had they asked only for a declaratory judgment, there would have been no requirement that they go to the Claims Board and the Legislature prior to maintaining the lawsuit.

The Court of Appeals mistakenly concludes that the general concern of federal courts about the delay inherent in the decision to abstain and the related concern about the burdensomeness of resort to more than one decision-making process makes the decisions of

this court in *Bellotti v. Baird*, 428 U.S. 132, 150 (1976), and *England v. Medical Examiners*, 375 U.S. 411, 418 (1964), controlling in this situation. We disagree that those cases apply to delay caused by the federal litigant who chooses the delay-causing route.

It is clear in the record and it must have been clear to the Court of Appeals that when the plaintiffs brought their action in the Circuit Court of Dane County against the Board of Regents and Thomas H. Hoover, Registrar at the Madison campus, the action exceeded the directions of the abstention order of the district court. In its decision of May 4, 1978 (Appendix, p. 108), the Court of Appeals pointed out:

> "The complaint, filed in September 1973, sought declaratory relief and a refund of the nonresident tuition previously paid. Defendants demurred on two grounds, the significant ground for this appeal being that the court lacks jurisdiction over the subject matter in that the plaintiffs have not followed the dictates of sec. 285.01 regarding an action for debt against a state agency."

Thus, plaintiffs were in effect duplicating the lawsuit pending in the federal district court where they had also sought declaratory relief and money judgment in the amounts of the alleged overpayment of tuition fees. On May 3, 1974, the Circuit Court ruled that the claim for money must be made in accordance with sec. 285.01, Stats. Thus, as the district court pointed out in its order of July 30, 1976 (Appendix, p. 124), the plaintiffs were met promptly in the state trial court with the contention that they had chosen the wrong course within the state

system for the purposes of obtaining a speedy state court clarification of the two legal issues specified by the district judge. But, regardless, the plaintiffs continued to press their claim for money and appealed to the Wisconsin Supreme Court where they eventually lost.

The Court of Appeals has misinterpreted the question before it and has wrongfully applied the decisions of this court. The Court of Appeals has stated the question in the following language:

> "The fundamental question underlying both the decision to dismiss and the continuing willingness to abstain is whether a federal court that orders abstention to obtain a clarifying interpretation of state law is expected to wait until the federal litigant pursues state nonjudicial remedies such as the claim to the legislature involved here if the state courts refuse to clarify the law until those nonjudicial remedies are pursued." (Appendix, p. 111)

The question should be whether the court should continue to abstain where the federal litigant, upon being directed by the federal court to secure clarification of two points of law in the state court, exceeds that direction and seeks money damages against state officials and thereby invokes provisions of the state law requiring submission of the claim for damages to a Claims Board and the Legislature.

We think the answer to that question is in the affirmative. We think the Court of Appeals has missed the fact that the plaintiffs in the state court action were

responsible for invoking the requirement that they proceed through the Claims Board and the Legislature of the State of Wisconsin. The concern of federal courts about the delay inherent in the decision to abstain is a general principle that was not the real issue in the cases cited by the Appeals Court to support its conclusion that it was improper to wait for additional state proceedings.

In *England v. Medical Examiners*, 375 U.S. 411 (1964), this court merely mentioned the fact that abstention does bring about delay and expenses, Id., at 418. The real issue in the case was whether a plaintiff upon being told to go to the state court to obtain a clarification of state law could pursue the federal claims in federal court. This court stated that by choosing to litigate federal claims in state court the expense and delay inherent in abstention could be avoided. In *Baggett v. Bullitt*, 377 U.S. 360 (1964), this court held abstention not appropriate. However, time and delay was only an added factor of secondary importance. The court's main reason for ruling abstention inappropriate was because construction of the statute in question could not eliminate the vagueness from its terms, hence a clarifying interpretation from a state court would likely not eliminate the need for passing on a constitutional question. Delay was only one of several less important considerations. In *Bellotti v. Baird*, 424 U.S. 132 (1976), the court noted that abstention is limited by considerations of delay and expense, but still held abstention appropriate since an interpretation of the statute in question would avoid or substantially modify the federal constitutional challenge to the statute.

Only in *Griffin, et al. v. County School Board of Prince Edward County, et al.*, 377 U.S. 218 (1964), not cited by the Court of Appeals, does it appear that this court has

considered that delay, in and of itself, may be a valid reason to hold abstention inappropriate. The facts in that case, however, are clearly distinguishable from the case at hand. There the issue was constitutional rights to equal educational opportunity. Here the issue is money. There the case had been delayed since 1951 by "resistance at the state and county level, by legislation, and by lawsuit." Here the case has been delayed since 1973 by the choice of proceedings brought by the federal litigant in state court.

This court has attempted to recognize the source of the delay associated with abstention in attempting to determine if continued abstention would be appropriate in a particular case. In *Government and Civil Emp. Org. Com. CIO v. Windsor*, 353 U.S. 364 (1957), the district court initially abstained "for a reasonable time to permit the exhaustion of such state administrative and judicial remedies as may be available." The plaintiff then brought state court action for the purpose of obtaining construction of a statute but his complaint in state court was such that none of the constitutional contentions were advanced in the state court action. As a result the state court never construed the statute in a manner to render it unconstitutional as to the plaintiffs in the district court action. The case was then resubmitted to the district court for final decree and the district court dismissed the action with prejudice. This court directed the federal court to retain jurisdiction until the definitive determination of local law was obtained from the local courts. The analogy with the present case is clear. The delay was caused by the federal litigant not bringing the appropriate action in state court.

II. The Lower Court Decided An Important Question Of Federal Law Which Has Not Been But Should Be Settled By This Court.

The Court of Appeals pointed out that this case is one of first impression (Appendix, p. 116). The court attempts to draw an analogy in the inter-relationship between the Fifth Circuit and the Texas State Court in *United Services Life Ins. Co. v. Delaney*, 328 F. 2d 483 (5th Cir. 1964), *cert. denied*, 377 U.S. 935. In that case the federal court abstained and then the Texas Supreme Court refused a declaratory ruling because it would only be an advisory opinion since the federal court had retained jurisdiction.

That case is clearly distinguishable from the case at hand because here the litigant chose remedies in addition to declaratory judgment in the state court which required submission of the damage claim to a Claims Board and the Legislature prior to judicial action. This court has never decided the question whether abstention continues to be proper where the federal litigant goes to state court and employs legal procedures which require nonjudicial determinations prior to determinations of questions of statutory interpretation.

III. The Decision Below Interferes With Public Policy Of Wisconsin.

This court has long recognized that the federal courts should avoid the hazards of serious disruption of state government or needless friction between the state and the federal authorities, and this has been pointed out where state policy and matters close to the political interests of the state are involved in federal litigation. *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943);

Louisiana Power and Light Co. v. Thibodeaux, 360 U.S. 25 (1959).

In *Thibodeaux*, Justice Frankfurter justified abstention on the ground that a special proceeding such as eminent domain is "a matter close to the political interests of a state." In this case Wisconsin has two close political interests in the question before this court. First is the determination of the financial contribution to be made by a nonresident as opposed to resident students attending the University of Wisconsin System. The financing of education costs is a subject which should be left to the State of Wisconsin except in the most clear instances of interference with federal constitutional rights. The second interest relates to the procedures adopted by the State of Wisconsin for bringing suit for money damages against the state and its officials. It will only cause friction between the systems if federal courts entertain actions which are principally for money had and received before the state court system has an opportunity to decide such questions which may obviate the need for constitutional interpretation by the federal courts.

IV. Effect Of Decision Below Is Undesirable

In its Order commanding the district court to hear the merits of the damage claims, the Court of Appeals apparently agrees that the claims for injunctive and declaratory relief are moot. It is undisputed in the record that the plaintiffs have all graduated from the University of Wisconsin Law School and the statute in question has been replaced. Accordingly, only the damage issue remains.

The Order of the Court of Appeals has effectively removed the damage issue from the Wisconsin legislative and judicial system where it had been placed by choice by the federal litigant. This action by the Court of Appeals, if allowed to stand, will result in a precedent for bypassing the procedures set out by the State of Wisconsin for the processing of money claims. It will also result in additional litigation in the federal court where such litigation might have been avoided by the use of the procedures specified in Wisconsin law. This is an undesirable shifting of workloads and responsibilities from state government to the federal judiciary.

A stronger argument could be made for federal court intervention if the alleged violation of the litigants' constitutional rights was continuing, but here it is clear that the alleged violation of constitutional rights occurred several years ago and is thickly enmeshed in the money the litigants claim is due them because of overpayment of tuition fees. In addition the claimed deprivation involves only money, not personal freedon or any form of liberty.

V. Eleventh Amendment And Executive Immunity

Any award of damages by a federal court in this case would constitute a retroactive payment which as a practical matter could be satisfied only from the general revenues of the state and would be indistinguishable from an award of damages against the state. The court could grant only prospective relief. *Edelman v. Jordan*, 415 U.S. 651 (1974).

In addition, the Complaint contains no charge against any of the defendants of conduct for which executive

immunity would be inappropriate within the meaning of *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

VI. Dismissal Was Not An Abuse Of Discretion.

Federal Rule of Civil Procedure 41(b) provides in part:

> "(b) Involuntary Dismissal: Effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal * * *."

In *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962), this Court read 41(b) as not limiting the motion to dismiss to the defendant, but as allowing the court to dismiss on its own motion. This authority to dismiss *sua sponte* is an inherent power necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. *Link* at 630, 631.

Here the question is not whether the reviewing court would as an original matter dismiss the action, but rather, whether the lower court abused its discretion. *National Hockey League v. Metro Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

The Court of Appeals said "we disagree that plaintiffs made the wrong choice and therefore see no justification for the dismissal" (Appendix, p. 115-116), but the court made no finding of an abuse of discretion, nor would the record support such a finding.

CONCLUSION

It is, therefore, respectfully submitted that certiorari should be granted and that in the alternative the decision of the Court of Appeals be summarily reversed.

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APPENDIX

DECISION of the United States Court of Appeals
for the Seventh Circuit, dated May 4, 1978

(formal parts omitted)

Before SWYGERT, CUMMINGS and TONE, *Circuit Judges.*

CUMMINGS, *Circuit Judge*. About six and one-half years ago, plaintiffs commenced this action in the Western District of Wisconsin challenging the constitutionality of a Wisconsin statute. After part of their complaint was dismissed, in 1973 the district judge abstained on the authority of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, and retained jurisdiction while plaintiffs sought relief in the state courts. In July 1976, having been presented with no clarifying interpretation of state law, the district court dismissed the complaint and plaintiffs filed this appeal.

At the time their first complaint was filed, the four plaintiffs were students at the University of Wisconsin Law School and were classified as nonresidents for tuition purposes. Their October 27, 1971, complaint was a class action under 42 U.S.C. § 1983 challenging Wis. Stats. § 36.16 and seeking injunctive, declaratory and monetary relief. Section 36.16, which defined residents and nonresidents for tuition purposes,[1] was asserted to be

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[1] Section 36.16 provided in pertinent part:

"36.16 *Nonresident tuition at university; exceptions*

"(1)(a) Any adult student who has been a bona fide resident of the state for one year next preceding the beginning of any semester for which such student registers at the university, or any minor student whose parents

(footnote 1 continued on next page)

unconstitutional on its face because subsection (1)(ae) "granted resident status to resident women who are wives

(footnote 1 continued)

have been bona fide residents of the state for one year next preceding the beginning of any semester for which such student registers at the university, or any minor student whose natural parents are divorced or legally separated who has resided substantially in this state during his years of minority and at least one year next preceding the beginning of any semester for which such student registers at the university or whose mother or father has been a bona fide resident for one year next preceding the beginning of any semester for which such student registers at the university, or any minor student who is an orphan and who has resided substantially in this state during his years of minority and at least one year next preceding the beginning of any semester for which such student registers at the university or whose legal guardian has been a bona fide resident for one year next preceding the beginning of any semester for which such student registers at the university, or any minor student under guardianship in this state pursuant to ch. 48 or 880 who has resided substantially in this state during his years of minority and at least one year next preceding the beginning of any semester for which such student registers at the university or whose legal guardian if a person has been a bona fide resident of the state for one year next preceding the beginning of any semester for which such student registers at the university, shall while he continues a resident of the state be entitled to exemption from nonresident tuition, but not from incidental or other fees and tuition in the university.

"(ab) Nonresident members of the armed forces who are stationed in this state and their wives and children shall be entitled to the exemptions provided in par. (a) during the period that such member of the armed forces is stationed in this state.

"(ac) Any female student who attended the university as a minor student exempt from the fees for nonresident tuition, and, who would continue to be entitled to the exemptions provided in par. (a) except for having married a nonresident, shall continue to be entitled to such exemptions.

* * * * *

"(ae) Any female who marries a bona fide resident shall be entitled to the exemptions provided in par. (a) effective the semester following her marriage and while continuing to reside in this state.

* * * * *

(footnote 1 continued on next page)

of resident working husbands, but not to resident men who are husbands of resident working wives" and un-

(footnote 1 continued)

"(b) Any student who has not been a resident of the state for one year next preceding the beginning of any semester for which such student registers at the university, except as above provided, shall not be exempt from the payment of the nonresident tuition fees.

"(c) Except as otherwise provided in this section, the board of regents shall charge a nonresident tuition fee at the rate of not less than $200 per school year for any student who shall not have been exempted by this section, and may prescribe special rates of tuition for professional and graduate courses and for teaching extra studies, and for students in the university extension, and summer session divisions. The board of regents may fix the nonresident tuition fee of any resident of another state maintaining a university [residence] at a sum less than $200 per school year but not below the sum fixed in such other state for attendance by residents of Wisconsin at the university maintained by such other state.

"(d) The board of regents of the university may remit nonresident tuition either in whole or in part, but not other fees, to a number of needy and worthy nonresident students, not exceeding 8% of the number of nonresident students registered in the preceding year, upon the basis of merit, to be shown by suitable tests, examinations or scholastic records and continued high standards of scholastic attainment. The board of regents may remit nonresident tuition in whole or in part, but no other fees, to additional individual students at the university not exceeding 2% of the number of nonresident students registered in the preceding year who, in the judgment of the board of regents, are deserving of relief from the assessment of nonresident tuition because of extraordinary circumstances.

* * * * *

"(2) In addition to the number of remissions of nonresident tuition authorized under sub. (1), each state senator and each * * * representative to the assembly may recommend for attendance at the university a nonresident whose scholastic qualifications entitle him to attend the university and whose nonresident tuition for the school year for which recommended shall be remitted by the board of regents. Not more than one such remission shall be made for any one member and each nonresident whose tuition shall have been remitted under this subsection shall be entitled to continue in attendance at the university for the period for which recommended if such nonresident continues to meet the university's

(footnote 1 continued on next page)

constitutional as interpreted by the defendant officials because it was being construed "so as to create an irrebutable [sic] presumption of non-residency for such students who commence their studies shortly after establishing residency in the State of Wisconsin" (Complaint ¶ 23).

Before the original defendants answered the complaint, on November 15, 1971, plaintiffs filed an amended complaint which added several defendants. The defendants were and are those who were then serving as Governor of Wisconsin, Regents of the University of Wisconsin, the President of the University of Wisconsin, and the Chancellor, Registrar, Residency Examiner and the members of the Committee on Appeals from

(footnote 1 continued)

general standards for continuance therein as a student. Such recommendations shall be submitted annually to the board of regents in such manner as the board of regents may designate not later than the end of the first week of instruction of the semester in which the remission of tuition is to be effective, provided that a state senator or * * * representative to the assembly who assumes office during a school year may make a recommendation for the 2nd semester of that year only when a recommendation of his predecessor is not effective for that term and provided further that should any nonresident student so recommended for any year fail to matriculate for any semester a successor for such semester may be recommended by such state senator or * * * representative to the assembly.

"(3) In determining bona fide residence, filing of state income tax returns in Wisconsin, eligibility for voting in the state of Wisconsin, motor vehicle registration in Wisconsin, and employment in Wisconsin shall be considered. Notwithstanding the provisions of par. (1)(a), a student from another state who is in this state principally to obtain an education will not be considered to have established a residence in Wisconsin by virtue of attendance at educational institutions.

"(4) In addition to the remission of resident and nonresident tuition under sub. (1), the university shall as athletic scholarships grant full remission of fees, and resident and nonresident tuition up to the maximum number of students enrolled on the Madison campus for whom such remission is permitted under Big Ten rules, as recommended by the Madison campus athletic director."

Non-Resident Tuition of the University of Wisconsin, Madison campus. All were sued in both their individual and official capacities and the Regents also were sued as a collective body. The amended complaint set forth facts and allegations about each of the named plaintiffs in order to indicate that they were bona fide residents of the state, such as the dates upon which plaintiffs moved to Wisconsin, acquired drivers' licenses, registered automobiles, registered to vote, and paid state income taxes. Plaintiffs Lister, Cooney and Turley further alleged that they were dependent upon the earnings of their wives, who were full-time employees of Wisconsin employers. In a part of the amended complaint that became important in the district court's January 1972 order, plaintiffs explained that Cooney had applied for resident status to the Registrar, Residency Examiner and "Committee for resident status" in January of 1971, that Thiel had done so in August and Lister in September of that same year and that Turley had not applied because he viewed such an application as a futile exercise. As to the constitutional issues involved, the amended complaint added the contention that Section 36.16 "granted exemptions from nonresident tuition to nonresidents while denying resident status to plaintiffs * * *," apparently in reference to sections of the statute such as (1)(ab) and (4), which exempt from nonresident tuition members of the armed forces and certain athletes.

On December 3, 1971, defendants moved to dismiss the amended complaint for lack of subject matter jurisdiction, lack of personal jurisdiction and failure to state a claim upon which relief could be granted. Reasoning that no case or controversy existed as to the semesters for which a plaintiff failed to apply to the University officials for an exemption, in an opinion and order on January 24, 1972, the district court dismissed claims for damages for those

semesters.[2] Also involved in the January 24 opinion and its subsequent reconsideration (but no longer pivotal issues on this appeal) were plaintiffs' requests for an interlocutory injunction, for summary judgment and for the convening of a three-judge court, and the district court's further inquiry into whether subject matter jurisdiction was lacking because of an insufficient amount in controversy.[3]

By December of 1972, three of the four named plaintiffs had been granted resident status for their remaining semesters; therefore pursuant to a stipulation and order granting leave for filing they filed a second amended complaint. That pleading added two reasons why Section 36.16 was unconstitutional: first, it asserted that the language in subsection (3) excluding from resident tuition those in Wisconsin "principally to obtain an education" was vague, created an impermissible classification and interfered with the right to travel; next it added that the Section had been administered in an arbitrary and irrational manner, without objective standards or adequate reasons for refusals.

Shortly after the second amended complaint was filed, plaintiffs moved for partial summary judgment and defendants responded with a motion to dismiss and a motion to stay further proceedings. This motion to stay

[2] The district court did not state in its order how many semesters were involved and the complaint leaves the question unclear. Compare, *e.g.*, ¶ 40 with ¶ 27. It is clear, however, that the dismissal at least did affect recovery for one semester by named plaintiff Turley. See ¶ 40.

[3] The age of this case is reflected by the fact that, because the complaint was filed before *Lynch v. Household Finance Corp.*, 405 U.S. 538, the district court was unsure whether a controversy exceeding $10,000 in value was required. When that decision was handed down in March of 1972, the district court quickly affirmed its jurisdiction.

initially was premised on the existence of two pending state court claims similar to those in plaintiffs' second amended complaint. In granting the motion to stay in an opinion and order on July 11, 1973, however, the Court assumed that there were no state court actions pending[4] but concluded that *Pullman* abstention was appropriate because plaintiffs' constitutional claims could be substantially altered or obviated altogether if the state court resolved two issues of state law: "whether the statute creates an irrebuttable presumption against resident classification for students coming to Wisconsin principally for their education and whether the statute authorizes different treatment for males married to female residents than for females married to male residents" (Mem. op. 11). The district court retained jursidiction of the action pending resolution in state court of the assertedly unclear issues of state law.[5]

[4] Plaintiffs had brought before the court evidence that one of the state cases was about to be dismissed on stipulation and the other was subject to a stipulated continuance pending resolution of another case.

[5] The opinion of July 11, 1973, also denied plaintiffs' request for a three-judge court on the grounds that the complaint focused more on the statute's administration than the statute itself and that it would be possible to enjoin the administration without declaring the statute unconstitutional. Although plaintiffs did not challenge this ruling at the time, in response to a question at oral argument they contended with some support (given one of the challenges in the October 1971 complaint and another in the December 1972 complaint, both of which were directed at the statutory language itself) that the holding that a three-judge court was unnecessary may have been an extremely narrow interpretation of the now repealed 28 U.S.C. § 2281. See *Stone v. Egeler*, 506 F.2d 287 (6th Cir. 1974); Currie, *The Three-Judge Court in Constitutional Litigation*, 32 U.Chi.L.Rev. 1 (1964). The import of the district court's decision on convening a three-judge court is that if a three-judge court was required, several courts have held that a district judge on his own does not have the power to order abstention. See *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713; *Greenspan v. Klein*, 550 F.2d 856, 860 (3d Cir. 1977); *Apel v. Murphy*, 526 F.2d 71 (1st Cir. 1975); but see *Steffel v. Thompson*, 415 U.S. 452, 457 n. 7; *Blount v. Mandel*, 400 F.Supp. 1190 (D. Md. 1975). Because of our disposition of the case, because plaintiffs did not challenge the district court ruling on this ground and because no injunction would be appropriate on remand (see Part II *infra*), we need not reach this issue.

Rather than appealing this order, plaintiffs commenced an action in the Circuit Court for Dane County, Wisconsin, against the Board of Regents and Thomas H. Hoover, Registrar at the Madison campus. The complaint, filed in September 1973, sought declaratory relief and a refund of the nonresident tuition previously paid. /6 Defendants demurred on two grounds, the significant ground for this appeal being that "the court lacks jurisdiction over the subject matter in that the plaintiffs have not followed the dictates of Section 285.01 regarding an action for debt against a state agency." Although plaintiffs contend that the Circuit Court for Dane County in the nonresident tuition context had declined to read the statute in that manner, defendants argued that Section 285.01/7 requires that apart from any appeal to University officials a claim must be made to the state legislature before an action can be brought against the state. See, *e.g.*, *Trempeleau County v. State*, 260 Wis. 602 (1952). On May 3, 1974, the Circuit Court accepted defendants' contention and dismissed plaintiffs' state complaint.

Based on that dismissal and a December 21, 1973, opinion by the Wisconsin Supreme Court in *Hancock v. Regents of the University of Wisconsin*, 61 Wis.2d 484,

/6 The state suit sought recovery only for the four named plaintiffs. At about the same time the state suit was filed, the district court accepted the parties' stipulation that the federal action could not be maintained as a class action.

/7 Section 285.01 provides:

"*Actions against state; bond.* Upon the refusal of the legislature to allow a claim against the state, the claimant may commence an action against the state by service as provided in s. 262.06(3) and by filing with the clerk of court a bond, not exceeding $1,000, with 2 or more sureties, to be approved by the attorney general, to the effect that he will indemnify the state against all costs that may accrue in such action and pay to the clerk of court all costs, in case he fails to obtain a judgment against the state."

plaintiffs filed a motion in the federal court on May 10, 1974, requesting the district judge to vacate his stay order. The motion reasoned first that as a result of the Circuit Court's dismissal plaintiffs no longer had a speedy means of construing Section 36.16 in state court because it would be necessary to appeal the dismissal and then litigate the merits after remand. Next, plaintiffs argued that *Hancock*, which involved a law student's attempt on similar facts to recover his second and third year nonresident tuition, offered sufficient clarification of the meaning of Section 36.16 to make abstention no longer necessary./8

That motion was still pending before the district judge almost two years later when plaintiffs' appeal of the dismissal of their state court action was decided by the Wisconsin Supreme Court. In *Lister v. Board of Regents*, 72 Wis.2d 282, the Supreme Court affirmed the dismissal of the complaint, ruling first that the damage claim against the state was barred because of plaintiffs' failures to make claims to the legislature./9 Next it reasoned that it should not rule on plaintiffs' request for declaratory relief because "the only consequence" of such a ruling would be its effect on the fruitless damage claim. 72 Wis.2d at 308. In refusing to rule on the request for a declaratory judgment, the Court explicitly noted the district court's stay order and

/8 Hancock's claim for his third year was held not justiciable by the Wisconsin Supreme Court because he had not applied to the appropriate University officials for resident status. 61 Wis.2d at 492. See Part II *infra*. The claim for the second year was rejected because Hancock did not satisfy the four criteria outlined in Section 36.16(3): filing Wisconsin income tax returns, eligibility for voting, motor vehicle registration, and employment. For reasons not explained to us by either party, the Wisconsin Supreme Court did not discuss whether Hancock had made a claim to the legislature pursuant to Section 285.01.

/9 The Court listed the amounts sought at $1,551 by Lister, $3,091 by Cooney, $770 by Thiel, and $1,551 by Turley; the total amount at issue was $6,963. 72 Wis.2d at 288.

admitted that despite the various jurisdictional impediments, it had "inherent authority" to grant declaratory relief. *Id.* at 309. It declined to do so, however, noting that Section 36.16 had been repealed during this litigation in 1973[10] and reasoning that the issue therefore was no longer of sufficient public importance to justify a ruling.

In June 1976, plaintiffs presented the district court with the *Lister* opinion and again moved that the abstention order be vacated. In addition to the arguments previously asserted in their May 10, 1974, motion, plaintiffs emphasized the state court's refusal to construe the statute, the burdensomeness of the legislative claims procedure, and the legislature's rejection of Hancock's claim on similar facts. On July 30, 1976, the district court dismissed the action on its own motion. While accepting that "the plaintiffs' effort has been in good faith," the court noted that plaintifss were quickly advised in the state courts that "they had chosen the wrong course within the state system." It further explained that the reasons for abstention were undiminished and therefore concluded that "three years has been sufficient time within which to retain jurisdiction in this court awaiting state adjudication of state issues, and that plaintiffs must accept responsibility for their choice of a course of litigation within the state system." After the district court denied plaintiffs' motion seeking reconsideration and pledging to file a claim with the legislature, plaintiffs filed this appeal from the judgment dismissing the complaint.

[10] The Court stated in a footnote that Section 36.27(2), which replaced Section 36.16, itself was replaced in 1975 by a new Section 36.27(2), which was similar in format to the original Section 36.16 involved in this action. It concluded that in several key respects, however, "the two sections differ substantially." 72 Wis.2d at 310, n.29.

The issues raised by the parties on appeal all concern jurisdiction and can be divided into two groups. The first group of issues relates to abstention and involves both whether the district court's initial decision to abstain was correct and whether its dismissal following abstention was justified. Because they are less substantial, we consider second a group of two issues based on the jurisdictional limits set by Article III of the federal Constitution: whether plaintiffs' claims for refunds for semesters for which no application for resident tuition was filed with University officials constitute a "case or controversy" and whether all of plaintiffs' claims have become moot during the long period of litigation. We conclude that all of the plaintiffs' damage claims are still properly before the court below and that abstention is no longer appropriate; therefore we reverse the district court's order of January 24, 1972, dismissing part of plaintiffs' amended complaint and its order of July 30, 1976, dismissing the action as a whole and direct the district court to hear the merits of the damage claims.

I. *The Abstention Issues*

The fundamental question underlying both the decision to dismiss and the continuing willingness to abstain is whether a federal court that orders abstention to obtain a clarifying interpretation of state law is expected to wait until the federal litigant pursues state nonjudicial remedies such as the claim to the legislature involved here if the state courts refuse to clarify the law until those non-judicial remedies are pursued.[11] At least as applied to the facts of this case, our answer is that the district court

[11] Because of our disposition of this case, it is unnecessary to decide whether the fact that plaintiffs pursued state remedies in good faith is sufficient by itself to avoid a dismissal in this context.

should not have waited. See *Vickers v. Trainor*, 546 F.2d 739, 744 (7th Cir. 1976).

The first reason why waiting for additional state proceedings was inappropriate is that it is inconsistent with the general concern of federal courts about the delay inherent in a decision to abstain (see *Bellotti v. Baird*, 428 U.S. 132, 150; *England v. Medical Examiners*, 375 U.S. 411, 418) and the related concern about the burdensomeness of resort to more than one decision-making process. Cf. *Baggett v. Bullitt*, 377 U.S. 360, 378. The importance of these concerns is underscored by the specific requirement at issue here, which as plaintiffs contend and defendants do not deny, requires first the submission of the claim to a Claims Board, a process consuming about four months, and then the introduction of a bill into the legislature followed by the normal time-consuming procedures in committee and in both houses of the legislature. Clearly the steps that the district court impliedly required of the plaintiffs here are not the "easy and ample means" available in *Pullman*, 312 U.S. 496, 501, when the doctrine of abstention was conceived.

This case was brought under 42 U.S.C. § 1983. Waiting for non-judicial proceedings also is inconsistent with the related federal policy of not requiring exhaustion of state non-judicial remedies in such cases. *Monroe v. Pape*, 365 U.S. 167; *Damico v. California*, 389 U.S. 416; *Ellis v. Dyson*, 421 U.S. 426, 432-433; but see *Runyon v. McCrary*, 427 U.S. 160, 186 n* (Powell, J., concurring).[12] To require resort to the Claims Board and legislature before a federal court could rule on a constitutional claim would render

[12] Even those commentators who have objected to the proposition that exhaustion is not required in Section 1983 cases probably would not require exhaustion here in light of the burdensome legislative procedure involved and the failure to provide interim relief. See, *e.g.*, Note, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U.Chi.L.Rev. 537 (1974).

meaningless the policy of not requiring exhaustion in any case in which a state's law is unclear and that state has an applicable statute similar to Wisconsin's Section 285.01. Cf. *Brown v. Bronstein*, 389 F.Supp. 1328, 1333 (S.D. N.Y.1975).

Third, to the extent that absention decisions consider the friction created by federal interventions into subjects of significant state concern (see *Vickers v. Trainor*, 546 F.2d 739, 746 (7th Cir. 1976); Hart and Wechsler's *The Federal Courts and the Federal System* 944 (2d ed. 1973)), that consideration is minimized in this case. The state's Supreme Court had an opportunity to rule on the issues involved but, despite its awareness that the district judge was awaiting its construction of the statute, held that the case was not important enough for it to use its inherent authority to decide the issue in the absence of proper procedural prerequisites. This admitted unimportance of the issue to the state judiciary rebuts defendants' contention and the district court's conclusion that "the force of the reasons for awaiting state judicial action * * * is undiminished." A. 40. Cf. *Hull v. Petrillo*, 439 F.2d 1184, 1188 (2d Cir. 1971). In fact, even if the state court had not admitted that it viewed the issue as unimportant, its deliberate avoidance of the issue due to jurisprudential concerns could be sufficient to overcome any comity considerations and justify the reassertion of federal jurisdiction. *414 Theatre Corp. v. Murphy*, 499 F.2d 1155, 1157 (2d Cir. 1974).

Although these three considerations present a powerful case for establishing a general rule against continuing to abstain after a state court requires resort to potentially time-consuming non-judicial proceedings before it clarifies the law, we need not go so far here. Even assuming that significant problems of delay, the related federal policy of non-exhaustion and the absence of a substantial comity

concern must be balanced against the extent of the ambiguity in state law and the resulting need for clarification (see IA *Moore's Federal Practice* ¶0.203[1] at 2115-2116), we note as a fourth consideration here the fact that the district judge's concerns about the ambiguities in the state law seem relatively unpersuasive.

The district court's July 11, 1973, opinion offered only briefly two possible constructions of Section 36.16 that might alter substantially the constitutional issues presented./13 First, it suggested that the last sentence in Section 36.16(3) (see note 1 *supra*) "might be construed by a state court to provide that a student from another state who is in Wisconsin principally to obtain an education cannot be classified as a bona fide resident solely on the basis of his attendance at an educational institution in Wisconsin" (Mem. op. 9-10). Apparently this suggestion means that the state courts might read the statute to exclude automatically from resident classification any student who came to Wisconsin principally to obtain an education. Put in context, however, the part of the sentence concerned with the evaluation of resident status of students in the state "principally to obtain an education" is related to and modified by the phrase "by virtue of attendance at educational institutions." Thus the more reasonable reading of that sentence, which is part of a subsection devoted to listing the factors that should be considered in determining bona fide residence, is that attendance at an educational institution is not to be a factor in making out a case as a bona fide resident. Even assuming the correctness of the district court's reading, it could be argued that the plaintiffs' claims would not be altered

/13 Defendants compounded that omission by not offering any explanations of how the state courts could have clarified the statute. Wisconsin has no procedure whereby important state law questions can be certified by a federal court to the Wisconsin Supreme Court. Cf. *Elkins v. Moreno*, ... U.S. ....., 46 LW 4337, 4342.

substantially because the court's reading simply places more reliance on the phrase plaintiffs challenge as vague, "principally to obtain an education."

Alternatively, the district court suggested that the broad language of Section 36.16(3) might be construed to require that males who marry bona fide female residents are entitled to resident status as are females who marry bona fide male residents. In the absence of further explanation by the district court or the State of Wisconsin in its briefs and argument, we do not find any such broad language in Section 36.16(3), which we read as listing factors to determine bona fide status in the first sentence (see *Hancock v. Regents of the University of Wisconsin*, 61 Wis.2d 484 (1973)) and excluding a factor in the second sentence. In any event, to read that Section as including males and thus covering all students would render unnecessary Section 36.16(1)(ae)/14 and thus violate fundamental principles of statutory construction. See *Johnson v. State*, 76 Wis.2d 672, 676 (1977).

The district court's decision to dismiss the case recognized that plaintiffs acted in good faith and apparently relied solely on the fact that "plaintiffs must accept responsibility for their choice of a course of litigation within the state system." Based on the above reasons why on these facts plaintiffs did not need to pursue the non-judicial remedies available to them, we disagree that plaintiffs made the wrong choice and therefore see no

/14 Although not identified as unclear by the defendants or the district court and apparently believed to be clear by the district court, there may be some ambiguity in Section 36.16(1)(ae) itself. Plaintiffs' argument based on that Section seems to assume that the word "marries" means "is married to;" if the Section is limited only to those whose spouses were bona fide residents at the time of their marriage, then plaintiffs may not have standing to challenge the alleged sex discrimination because they would not qualify for the statute's benefits even if the statute were extended to males. Compare *Weinberger v. Wisenfeld*, 420 U.S. 636.

justification for the dismissal.[15] For the same reasons, rather than dismissing the case, at least after the *Lister* opinion by the Wisconsin Supreme Court the district judge should have granted plaintiffs' motion to vacate the stay and taken up the merits of the case, despite his identification of some unclear issues of state law.

In holding not only that the dismissal was unwarranted but also that the district court must now decide this case even assuming the existence of some ambiguity, our decision is consistent with analogous cases and principles. As a general matter, for example, the Supreme Court recently has recognized that in appropriate circumstances harms such as delay can outweigh the need for clarification and dictate that abstention be avoided. See *Mayor v. Educational Equality League*, 415 U.S. 605, 628; *Bellotti v. Baird*, 428 U.S. 132, 150; see also *Herald Co. v. McNeal*, 553 F.2d 1125, 1130 (8th Cir. 1977); but see *Chicago v. Fieldcrest Dairies*, 316 U.S. 168, 172-173.

More specifically, although this case appears to be one of first impression, an analogous problem in the inter-relationship between the Fifth Circuit and the Texas state courts has produced a similar result. After the Fifth Circuit *en banc* ordered abstention in *United Services Life Ins. Co. v. Delany*, 328 F.2d 483 (5th Cir. 1964), certiorari denied, 377 U.S. 935, the Texas Supreme Court held that when the

[15] While the Supreme Court has advised that retaining jurisdiction pending state court clarification is the "proper course" (*American Trial Lawyers Association v. New Jersey Supreme Court*, 409 U.S. 467, 469), it is true that under some circumstances dismissal without prejudice when abstention is ordered may be appropriate. See *Harris County Commissioners Court v. Moore*, 420 U.S. 77. Even if it could be argued that the Supreme Court's general advice can be ignored on the facts of this case, the possibility of dismissal is of no help to defendants here because, apart from potential statute of limitation problems, the district court's dismissal here must be assumed to be with prejudice. See Federal Rule of Civil Procedure 41(b).

federal district court retained jurisdiction of the case pending state court clarification, as it did in *Delany*, litigation aimed at clarifying the law was no more than a request for an advisory opinion so that the state court must dismiss the case for lack of jurisdiction without clarifying the law. While the Fifth Circuit now avoids this problem by directing district courts in the first instance not to retain jurisdiction in appropriate cases while awaiting clarification (see *Barrett v. Atlantic Richfield Co.*, 444 F.2d 38 (5th Cir. 1971); note 15 *supra*), it is worth noting that after Texas' refusal to clarify the law in *Delany* the Fifth Circuit *en banc* ruled on the merits of the dispute without waiting to remand to the district court with directions to dismiss in order to allow state court clarification. 358 F.2d 714 (5th Cir. 1966), certiorari denied, 385 U.S. 846.[16] Its apparent decision that the long delay dictated an immediate ruling on the merits despite the availability of state court clarification is particularly persuasive here because it was made in the absence of a confession by the state that the issues involved were unimportant and in the absence of the applicability of the policy against requiring exhaustion in Section 1983 cases. Consistent with the Fifth Circuit's rationale and in light of the reasons why resort to state non-judicial remedies should not have been required on these facts, the district court on remand should consider the merits of plaintiffs' claims and should do so in an expeditious manner.

[16] Apparently neither the Fifth Circuit nor any other circuit has faced the situation in which a state court subsequent to federal equitable abstention has refused jurisdiction on the ground that a litigant's reservation of his federal claims under *England v. Louisiana School Board of Medical Examiners*, 375 U.S. 411, similarly requires an advisory opinion. Consistent with the reasoning of this opinion, Professor Moore has suggested that "if a state court will not rule on the state issue unless the federal claim is also presented for binding determination, abstention should not be ordered." IA *Moore's Federal Practice* ¶0.203[1]; *England, supra*, at 422 n. 12. But cf. *28 East Jackson Enterprises Inc. v. Cullerton*, 551 F.2d 1093, 1096 (7th Cir. 1977), certiorari denied, 46 LW 3216 (*England* reservation under 28 U.S.C. § 1341).

II. *Article III Issues*

Taken together, defendants' arguments based on lack of jurisdiction potentially have relevance as defenses when the merits of the case are heard but have little or nothing to do with the power of this Court or the district court to hear the case. Both the claim that no case or controversy exists as to some semesters and the claim that the case is now moot are without merit and therefore do not alter our decision to send the case to the district court with directions to hear the merits.

A. *Case or Controversy*

Defendants' motion to dismiss plaintiffs' claims for semesters in which reclassification by University officials was not sought was accepted without explanation by the district court on the ground that "no genuine controversy exists." Defendants support that ruling by citing the Wisconsin Supreme Court's decision in *Hancock*, in which that court held a similar case nonjusticiable because "the plaintiff never requested a change in status * * * and, therefore, the defendants had no opportunity to deny the requested change and it follows that no controversy existed with respect to that year." 61 Wis.2d at 495.

Apparently this argument has two dimensions. On one level, the level chosen by defendants at oral argument, the argument is that even though the parties may now have adverse interests because plaintiffs seek money from defendants, there was no adverse interest at the time of the tuition payment since no request was made or refused at the start of some semesters. Cf. 61 Wis.2d at 492; Br. 8. This argument seems to assume that the time at which adverseness is determined is the time of the event that forms the basis of the suit and that in order to be adverse the parties must recognize their adverse interests at that

time. To state this argument is to highlight its inconsistency with the accepted understanding that Article III of the federal Constitution is concerned with whether the parties have a "present conflict of interest." 6A *Moore's Federal Practice* ¶ 57.11 n. 103. Not only does requiring explicit assertions of conflicting interests at a certain time before suit bear little relation to the policies behind requiring a case or controversy—"to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution" (*Id.* at 57-103)—but also if applied literally would exclude from the courts a significant group of cases whose justiciability has never been doubted: for example, suits by purchasers of securities when they later determine they were deceived (*e.g.*, 15 U.S.C. § 78 j(b)) and suits by former employees who later consider their discharge to have been discriminatory (*e.g.*, 42 U.S.C. § 2000).

A different and somewhat more plausible form of the argument is that the dispute is not ripe for judicial decision because, as in other instances in which a plaintiff's case has come to court before being disposed of by an administrative agency (see, *e.g.*, *Abbot Laboratories v. Gardner*, 387 U.S. 136), the position of the defendants and the rights of the plaintiff are not yet in fixed, final form. Cf. 61 Wis.2d at 492. Although lack of ripeness can be a basis for non-justiciability, a distinction must be drawn between those cases in which a plaintiff brings a suit during a period in which state non-judicial remedies are still available and those cases in which a suit is brought when state remedies are unavailable. It is in the former set of cases that courts have held that a controversy may not be ripe for judicial resolution. See, *e.g.*, *Citizens Communication Center v. Federal Communications Commission*, 447 F.2d 1201 (D.C. Cir. 1971). Even if plaintiffs are wrong in arguing that a requirement that such remedies be pursued is merely an

indirect method of mandating exhaustion in Section 1983 cases and therefore contradicts the established policy discussed *supra*,[17] the former set of cases is inapplicable because as this statute has been interpreted the application to University officials was to be made at the beginning of the semester for which resident status is sought. See 61 Wis.2d at 489. The state does not contend that the administrative process is still open to the plaintiffs. Thus plaintiffs' claims fall into the latter set of cases. When the non-judicial remedies have not been and can no longer be pursued, the state may, depending on the action, have some type of defense but the ripeness doctrine is inapplicable because the denial is complete and the issues are clearly and firmly presented for review. See *Gardner v. Toilet Goods Association*, 387 U.S. 167.

Although plaintiffs' failure to request reclassification for some semesters therefore does not render this case nonjusticiable, it may be considered on remand, at least if the good faith defense is applicable, because defendants' lack of knowledge of plaintiffs' claims and their possible inability under state law to act on those claims could be relevant to good faith or perhaps another defense. As a matter of Article III jurisdiction, however, defendants' argument may reflect how the Wisconsin courts interpret the judicial powers under that state's constitution but it is

[17] Contrary to plaintiffs' lengthy argument, it should be noted that some courts in Section 1983 cases have applied the ripeness doctrine to preclude jurisdiction based on failure to await a clear state administrative determination. See, *e.g.*, *Mendez v. Heller*, 530 F.2d 457 (2d Cir. 1976). While these cases do not discuss the contrary policy against requiring exhaustion in Section 1983 cases, the explanation must be that such a Congressional policy cannot expand the jurisdiction of federal courts to cover cases not sufficiently ripe as a constitutional matter. To the extent ripeness is a prudential, nonconstitutional doctrine, however, it would not be sufficient to justify requiring recourse to state non-judicial proceedings in violation of Congressional policy. See generally C. Wright, *Federal Courts* § 13 (3d ed. 1976).

not persuasive as a limit on the constitutional powers of federal courts.

B. *Mootness*

As to all of the counts, defendants argue that even assuming they once presented a justiciable case they no longer do so because the case has become moot. Based on the facts that the statute has been replaced and the plaintiffs are no longer students at the University, plaintiffs do not vigorously contest the mootness of their claims for injunctive and declaratory relief (see *e.g.*, *Kerrigan v. Boucher*, 450 F.2d 487 (2d Cir. 1971)), but do insist that their damage claims are not moot. According to the defendants, those claims are moot because the reimbursement sought is "incidental" to the mooted declaratory and injunctive relief and because "it is a claim prohibited by the Eleventh Amendment to the United States Constitution" (Supp. Br. 6).

The argument that the claims for damages or reimbursement are "incidental" misconceives the type of damages requested in cases that have been declared moot on this ground and the reasons for declaring cases moot on this ground. While drawing a firm line between incidental damages and damages necessary to sustain a controversy is not necessary here because of the significant amount of damages requested, it is important to note that none of the cases cited by defendants involved more than nominal damages, such as one dollar. See *e.g.*, *Kerrigan v. Boucher*, 450 F.2d 487 (2d Cir. 1971); *Anthony v. Massachusetts*, 415 F.Supp. 485 (D. Mass. 1976), certified to state court on another issue, 429 U.S. 66. The damages involved here have been a hotly contested issue throughout the litigation[18] and the almost $7,000 requested reinforces the conclusion that the damage claims are not "incidental."

[18] In its January 24, 1972, order, for example, the district court noted that "the essence of this dispute appears to be money."

Whether the $7,000 recovery is precluded by the Eleventh Amendment is an issue that should be considered by the district court on remand, but it does not affect the jurisdiction of this Court or the district court.[19] A state's immunity is a defense that must be pleaded and proven by a defendant (see *Illinois Central Railroad Co. v. Adams*, 180 U.S. 28); the mere assertion of such a potential defense cannot render a case moot.

No concluding statement highlighting the unfortunate and apparently avoidable delays in the adjudication of plaintiffs' federal claims is necessary because the facts of this case, particularly the six and one-half years of proceedings in two sets of courts without any judge considering the merits of the claims, present a powerful lesson of the lengthy delays that abstention can bring. If this case serves to remind the courts that abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it" (*Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813), perhaps the judicial energy expended served a useful purpose. For the plaintiffs, who might have reduced the delay by seeking an earlier appeal, the only relief this Court now can give is to reverse and remand for proceedings consistent with this opinion.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[19] We do not decide which defendants, if any, can successfully urge the bar of the Eleventh Amendment.

OPINION AND ORDER of the United States District Court for the Western District of Wisconsin, dated July 30, 1976

71-C-409
(Formal Parts Omitted)

On July 11, 1973, I granted defendants' motion for a stay of proceedings in this case, retaining jurisdiction, "pending the resolution in the Wisconsin state courts of the issues of state law presented here. . . ." In September, 1973, plaintiffs commenced an action in the Circuit Court for Dane County, Wisconsin, requesting declaratory relief and a refund of nonresident tuition. The Circuit Court dismissed their complaint on May 3, 1974, and on April 12, 1976, the Supreme Court of Wisconsin affirmed the Circuit Court's order, stating: "If and when the issue of the construction of sec. 36.16, Stats. 1969, comes before us as a result of a proceeding under sec. 285.01, we will construe the statute."

On May 10, 1974, plaintiffs moved in this court for an order vacating the stay entered July 11, 1973. The motion has never been acted upon. On June 15, 1976, plaintiffs have moved anew in this court for an order vacating the stay.

Defendants oppose the two motions for an order vacating the stay (and urge that a pending defense motion for dismissal be granted). They contend that the plaintiffs have not made a good faith effort to obtain in the state courts a resolution of the issues of state law presented to this court, as contemplated by this court's July 11, 1973 order. Plaintiffs and their counsel express resentment toward this contention. They insist that they have sought in good faith to obtain an adjudication in the state court, relying upon what they believed to be good authority for the particular course of litigation they chose, but that they have been frustrated in this effort;

that the state courts will not act unless and until plaintiffs have first sought relief from the state legislature; that this court's order of July 11, 1973 made no mention of seeking relief in a legislative forum; and that much expense and delay will attend application to the legislature and subsequent state judicial action.

I am prepared to accept that the plaintiffs' effort has been in good faith. However, it can hardly be suggested that they were not met promptly in the state trial court with the contention that they had chosen the wrong course within the state system. Moreover, the force of the reasons for awaiting state judicial action before proceeding to federal constitutional adjudication here is undiminished. I cannot say, of course, that the state courts have frustrated plaintiffs arbitrarily.

I conclude that three years has been sufficient time within which to retain jurisdiction in this court awaiting state adjudication of state issues, and that plaintiffs must accept responsibility for their choice of a course of litigation within the state system.

It is hereby ordered that this action is dismissed, on this court's motion, for the reason that no state adjudication of the state issues has been obtained by plaintiffs and no such adjudication may be anticipated within a reasonable interval.

Entered this 30th day of July, 1976.

BY THE COURT:

/s/ James E. Doyle
District Judge

OPINION AND ORDER of the United States District Court for the Western District of Wisconsin, dated July 11, 1973

71-C-409

(Formal Parts Omitted)

This is a civil action for injunctive, declaratory, and monetary relief. Jurisdiction is invoked pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).

The second amended complaint alleges that the named plaintiffs are students at the University of Wisconsin Law School; that said plaintiffs commenced their legal education on the following dates: Lister, Thiel and Turley - August, 1970, Cooney - September, 1969; that plaintiffs intend to complete their legal education and to practice law in Wisconsin; and that no plaintiff has any present intention to move to another state.

It is further alleged that plaintiffs became residents of Wisconsin and leased living accommodations on the following dates: Lister, Thiel and Turley - August, 1970, Cooney - August, 1969; that each plaintiff was emancipated from his parents at said time and has received no support from his parents at any relevant time; that each plaintiff registered to vote in Wisconsin on the following dates: Lister and Turley - March, 1971, Cooney - March, 1970, Thiel - August, 1971; that plaintiffs Cooney, Thiel, and Turley registered their automobiles in Wisconsin on the following dates: Cooney - August, 1970, Thiel - December, 1970, Turley - June, 1971; that plaintiff Lister's wife's automobile was registered in Wisconsin in April, 1971; and that each plaintiff received a Wisconsin driver's license on the following dates: Lister - September, 1971, Cooney - September, 1970, Thiel - December, 1970, Turley - June, 1971.

It is further alleged that plaintiff Cooney was employed part time in Wisconsin during 1969 and 1970, and paid income tax during said years; that Cooney's wife has been employed since September, 1970, and has 1969, and has paid Wisconsin income tax upon her earnings; that Cooney "is dependent" upon said earnings; and that Cooney was employed in Wisconsin during 1971 and Wisconsin income tax was withheld from his earnings.

It is alleged that plaintiff Thiel was employed part time in Wisconsin during 1970 and paid Wisconsin income tax during said year; that his wife is unemployed; and that he was employed in Wisconsin during 1971 and Wisconsin income tax was withheld from his earnings.

It is alleged that plaintiff Lister had no income in Wisconsin for 1970; that he filed a Wisconsin income tax return for 1970 with his wife; that his wife has been employed in Wisconsin since August, 1970, and has paid income tax on her earnings; that he is "dependent" upon said earnings; and that he was employed in Wisconsin during 1971 and Wisconsin income tax was withheld from his earnings.

It is further alleged that plaintiff Turley earned no income in Wisconsin for 1970, but filed a Wisconsin income tax return with his wife; that plaintiff Turley's wife has been employed since September, 1970, an dhas paid income tax upon her earnings; that he is "dependent" upon said earnings; and that he was employed in Wisconsin during 1971 and Wisconsin income tax was withheld from his earnings.

It is alleged that each plaintiff applied for resident status for the semesters beginning on or about the

following dates: Lister - September, 1971, and January, 1972; Cooney - January, 1971, and January, 1972; Thiel - September, 1971; and Turley - January, 1972. It is alleged that said requests were denied although plaintiffs set forth the alleged facts set out *supra* in support of their applications. It is further alleged that plaintiff Thiel submitted a second application for resident tuition status for January, 1972, containing allegations substantially similar to those presented in the 1972 applications of Lister, Cooney, and Turley, and that defendants granted Thiel's application and denied the applications of the other named plaintiffs. It is also alleged that plaintiffs Lister and Turley submitted subsequent applications for residency status for the semester beginning August, 1972, substantially similar to prior applications, and that said applications were granted.

Plaintiffs further allege that students classified as "residents" are charged approximately $305.00 per semester and that an additional approximate tuition fee of $770.00 per semester is assessed against students who are classified as "non-residents."

Defendants' amended motion to stay further proceedings is presently before this court. On the basis of affidavits and other materials submitted by both parties, I find that there is no genuine issue as to the facts set out hereinafter under the heading "Facts."

FACTS

This action was commenced on October 27, 1971. The second amended complaint was filed on December 5, 1972. Said complaint alleges that Section 36.16, Wisconsin Statutes, is unconstitutional on its face and as applied on the following grounds: (1) that Section 36.16

violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by classifying plaintiffs who are bona fide Wisconsin residents for more than one year as nonresidents while treating certain classes of nonresidents as residents (members of the armed forces and their families who are stationed in Wisconsin, needy and worthy students, nonresident dependent children whose parents are employed full time in Wisconsin, nonresidents recommended by legislators, and certain athletes); (2) that Section 36.16 further violates the Equal Protection Clause by classifying student wives of male residents as "residents" but student husbands of female residents as "nonresidents;" (3) that Section 36.16(3), providing that a student from another state "who is in this state principally to obtain an education" will be classified as a "nonresident," is unconstitutionally vague and arbitrary; (4) that defendants have applied Section 36.16 arbitrarily and without developing objective criteria; and (5) that in some instances, Section 36.16 has created an unconstitutional irrebuttable presumption against resident classification for tuition purposes.

I find that as of October, 1972, the case of *Piellucci v. Board of Regents*, Case No. 137-396 (hereinafter referred to as *Piellucci*) was pending in the Circuit Court of Dane County, Wisconsin; that the complaint in *Piellucci* alleges that Section 36.16 is unconstitutional, raising grounds (1), (2), and (5) set out *supra*, and in addition alleging that said statute violates the privileges and immunities clause of the Fourteenth Amendment and the Constitution of the State of Wisconsin; that on January 5, 1973, the attorney for the plaintiffs in *Piellucci* sent the attorney for the defendants a signed stipulation and order dismissing the

case with prejudice to the plaintiffs;[1] and that although the attorney for the defendants has not signed said stipulation, if she is convinced that the *Piellucci* action was brought in good faith, she will sign the stipulation authorizing the dismissal without costs.

I find that on or about August 2, 1971, a complaint was filed in the Circuit Court of Dane County in an action entitled *Dempsey v. University of Wisconsin Board of Regents*, Case No. 134-161 (hereinafter referred to as "*Dempsey*"); that the complaint in *Dempsey* alleges that Section 36.16 is unconstitutional, raising grounds (1), (2), and (3) in part (the complaint in *Dempsey* does not raise the issue of vagueness), set out *supra*, and in addition alleging that said statute unconstitutionally interferes with plaintiff's right to travel and violates Article I, Section 15 of the Wisconsin Constitution; that on or about August 20, 1971, the defendants filed a demurrer in said state court action; that the filing of briefs on said demurrer has been suspended, pursuant to a stipulation by attorneys, pending the resolution of another action pending in the Circuit Court involving similar issues of "statutory construction;" and that said continuance is still in effect and the demurrer in *Dempsey* has not been decided.

I find that the Wisconsin Supreme Court has neither construed Section 36.16 nor evaluated the constitutionality of said statute under either the Wisconsin Constitution or the United States Constitution.

---

[1] Mr. Piellucci was classifed [sic] as a resident and was refunded his nonresident tuition as a result of obtaining a teaching position.

OPINION

Plaintiffs have filed an application for convening a three-judge district court, pursuant to 28 U.S.C. §§ 2281 and 2284. Accordingly, I must determine whether the case presented comes within the requirements of the three-judge statute, whether said action raises a substantial constitutional question, and whether the complaint formally alleges a basis for equitable relief, before proceeding to the merits of the case either by granting defendants' motion and abstaining but retaining jurisdiction, or by denying said motion. *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713 (1962).

The provisions of Section 36.16 are set out in pertinent part in the margin.[/2] A three-judge court must be convened when the movant seeks an injunction "restraining

[/2] 36.16 Nonresident tuition at university; exceptions

(1)(a) Any adult student who has been a bona fide resident of the state for one year next preceding the beginning of any semester for which such student registers at the university, or any minor student whose parents have been bona fide residents of the state for one year next preceding the beginning of any semester for which such student registers at the university, or any minor student whose natural parents are divorced or legally separated who has resided substantially in this state during his years of minority and at least one year next preceding the beginning of any semester for which such student registers at the university or whose mother or father has been a bona fide resident for one year next preceding the beginning of any semester for which such student registers at the university, or any minor student who is an orphan and who has resided substantially in this state during his years of minority and at least one year preceding the beginning of any semester for which such student registers at the university or whose legal guardian has been a bona fide resident for one year next preceding the beginning of any semester for which such student registers at the university, or any minor student under guardianship in this state pursuant to ch. 48 or 880 who has resided substantially in this state during his years of minority and at least one year

(footnote 2 continued on next page)

the enforcement, operation or execution of any State statute by restraining the action of any officer of such

(footnote 2 continued)

next preceding the beginning of any semester for which such student registers at the university or whose legal guardian if a person has been a bona fide resident of the state for one year next preceding the beginning of any semester for which such student registers at the university, shall while he continues a resident of the state be entitled to exemption from nonresident tuition, but not from incidental or other fees and tuition in the university.

(ab) Nonresident members of the armed forces who are stationed in this state and their wives and children shall be entitled to the exemptions provided in par. (a) during the period that such member of the armed forces is stationed in this state.

(ac) Any female student who attended the university as a minor student exempt from the fees for nonresident tuition, and, who would continue to be entitled to the exemptions provided in par. (a) except for having married a nonresident, shall continue to be entitled to such exemptions.

* * * *

(ae) Any female who marries a bona fide resident shall be entitled to the exemptions provided in par. (a) effective the semester following her marriage and while continuing to reside in this state.

* * * *

(b) Any student who has not been a resident of the state for one year next preceding the beginning of any semester for which such student registers at the university, except as above provided, shall not be exempt from the payment of the nonresident tuition fees.

(c) Except as otherwise provided in this section, the board of regents shall charge a nonresident tuition fee at the rate of not less than $200 per school year for any student who shall not have been exempted by this section, and may prescribe special rates of tuition for professional and graduate courses and for teaching extra studies, and for students in the university extension, and summer session divisions. The board of regents may fix the nonresident tuition fee of any resident of another state maintaining a university at a sum less than $200 per school year but not below the sum fixed in such other state for attendance by residents of Wisconsin at the university maintained by such other state.

(footnote 2 continued on next page)

State in the enforcement or execution of such statute . . . upon the ground of the unconstitutionality of such

(footnote 2 continued)

(d) The board of regents of the university may remit nonresident tuition either in whole or in part, but not other fees, to a number of needy and worthy nonresident students, not exceeding 8% of the number of nonresident students registered in the preceding year, upon the basis of merit, to be shown by suitable tests, examinations or scholastic records and continued high standards of scholastic attainment. The board of regents may remit nonresident tuition in whole or in part, but no other fees, to additional individual students at the university not exceeding 2% of the number of nonresident students registered in the preceding year who, in the judgment of the board of regents, are deserving of relief from the assessment of nonresident tuition because of extraordinary circumstances.

* * * *

(2) In addition to the number of remissions of nonresident tuition authorized under sub. (1), each state senator and each * * * representative to the assembly may recommend for attendance at the university a nonresident whose scholastic qualifications entitle him to attend the university and whose nonresident tuition for the school year for which recommended shall be remitted by the board of regents. Not more than one such remission shall be made for any one member and each nonresident whose tuition shall have been remitted under this subsection shall be entitled to continue in attendance at the university for the period for which recommended if such nonresident continues to meet the university's general standards for continuance therein as a student. Such recommendations shall be submitted annually to the board of regents in such manner as the board of regents may designate not later than the end of the first week of instruction of the semester in which the remission of tuition is to be effective, provided that a state senator or * * * representative to the assembly who assumes office during a school year may make a recommendation for the 2nd semester of that year only when a recommendation of his predecessor is not effective for that term and provided further that should any nonresident student so recommended for any year fail to matriculate for any semester a successor for such semester may be recommended by such state senator * * * representative to the assembly.

(3) In determining bona fide residence, filing of state income tax returns in Wisconsin, eligibility for voting in the state of Wisconsin, motor vehicle registration in Wisconsin, and employment in Wisconsin shall be considered. Notwithstanding the provisions of par. (1)(a), a student from

(footnote 2 continued on next page)

statute." 28 U.S.C. §2281. I conclude that in the instant case, it would be possible to enjoin the state officials from administering Section 36.16 in the allegedly unconstitutional manner complained about by plaintiffs without holding that said state statute is unconstitutional. The gravamen of plaintiffs' claim is that the defendant state officials have unconstitutionally administered the statute by improperly determining bona fide residence under Section 36.16(3). Accordingly, it is not necessary to convene a three-judge court. *See Phillips v. United States*, 312 U.S. 246 (1941); 1 *Barron & Holtzoff, Federal Practice & Procedure* § 52 and cases cited therein at 280, n. 98.1; *C. Wright, Federal Courts* §50 (1970).

It is settled that a federal court may abstain in federal question cases, including actions founding jurisdiction on §1343, where unresolved issues of state law are "enmeshed" with federal questions and where the state court's binding interpretation of the challenged statute or its evaluation of the validity of said statute under the state constitution may either avoid or fundamentally alter the federal constitutional questions. *See Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 510 (1972); *Askew v. Hargrave*, 401 U.S. 476 (1971); *Reetz v.*

(footnote 2 continued)

another state who is in this state principally to obtain an education will not be considered to have established a residence in Wisconsin by virtue of attendance at educational institutions.

(4) In addition to the remission of resident and nonresident tuition under sub. (1), the university shall as athletic scholarships grant full remission of fees, and resident and nonresident tuition up to the maximum number of students enrolled on the Madison campus for whom such remission is permitted under Big Ten rules, as recommended by the Madison campus athletic director.

Section 36.15, Wisconsin Statutes (Supp. 1973).

Bozanich, 397 U.S. 82 (1970); *Harrison v. NAACP*, 360 U.S. 167 (1959); *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Hart & Wechsler, The Fed. Courts and The Federal System* 988-998 (1972); *C. Wright, Federal Courts* § 52 (1970). In the seminal *Pullman* case, an unanimous court elucidated the principles underlying what came to be known as the "Pullman abstention doctrine":

> "In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication [citation omitted] The reign of law is hardly promoted if an unnecessary ruling of a federal court is supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Pullman, supra* at 500.

"*Pullman* abstention" is not conditioned upon the existence of a pending state court action raising identical state law issues. I note, however, that in each case a court must consider the cost and delay incurred because of abstention, *see England v. Medical Examiner*, 375 U.S. 411, 418 (1964), and that the absence of a pending state action may be one factor mitigating against abstention. In *Pullman*, there was no pending state court action. The Court, noting that the plaintiffs had not apprised the lower courts of any procedural difficulties barring resolution of the issue of state law in state court, remanded the cause to the district court "with directions to retain the bill pending a determination of proceedings to be brought with reasonable

promptness, in the state court." *Pullman, supra* 501-502. The Supreme Court did not comment on the absence of a presently pending state action in *Lake Carriers Ass'n*, 406 U.S. 498 (1972); in *Reetz v. Bozanich*, 397 U.S. 82 (1970); or in *Harrison v. NAACP*, 360 U.S. 167 (1959). Instead, in each of these cases, the Court directed the district court to retain jurisdiction while the parties repaired to the state courts in order to institute appropriate proceedings. *Lake Carriers Ass'n, supra* at 512-13; *Reetz, supra* at 87; *Harrison, supra* at 179. In *Askew v. Hargrave*, 401 U.S. 476 (1971), the Court noted that a separate state action had been commenced subsequent to the filing of the complaint in the federal suit, but did not imply that the existence of such a pending state action is always a precondition to *Pullman* abstention. *Askew, supra* at 477.

Turning to the instant case, the last sentence in Section 36.16(3) might be construed by a state court to provide that a student from another state who is in Wisconsin principally to obtain an education cannot be classified as a bona fide resident solely on the basis of his attendance at an educational institution in Wisconsin. Furthermore, the broad language of Section 36.16(3) may be authoritatively construed to require that males who marry bona fide female residents are entitled to resident status as are females who marry bona fide male residents. Of course, in mentioning these alternatives, I intimate no view on the appropriate construction of Section 36.16 or on the merits of plaintiffs' claims. However, I conclude that an authoritative resolution of the ambiguities in Section 36.16 is sufficiently likely to avoid or modify the federal questions raised to warrant abstention.

I note that the countervailing considerations present in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971),

Harman v. Fossenius, 380 U.S. 528, 537 (1965), and *Baggett v. Bullit*, 377 U.S. 360, 378-379 (1964), are not present here. In *Wisconsin v. Constantineau*, the plaintiffs challenged a state statute on the ground that it condemned individuals falling within its purview to suffer a "grievous loss" without providing any procedural due process protections. The Supreme Court held that abstention was inappropriate because the statute contained no provisions whatsoever for notice and hearing and therefore was not ambiguous in any material aspect. *Wisconsin v. Constantineau, supra* at 438-39. In the instant case, the state statute contains a specific provision, Section 36.16(3), governing the classification of individuals who enter Wisconsin principally to obtain an education, but I have concluded that said provision is ambiguous.

In *Harman*, the Supreme Court concluded that the state statutes were "clear and unambiguous in all material respects;" because said action challenged a statutory scheme allegedly impairing the right to vote of a broad class of citizens, the Court also noted that the "importance and immediacy of the problem" mitigated against abstention. *Harman, supra* at 535-37. In *Baggett*, the Supreme Court reasoned that it was not likely that a state court construction of the challenged oath provisions would avoid or modify the construction issue because said oath was open to an "indefinite number" of interpretations. *Baggett, supra* at 376-378. The Court also noted that the delay caused by abstention and piecemeal adjudication in state courts would be "quite costly where the vagueness of [the] state statute may inhibit the exercise of First Amendment rights." *Baggett, supra* at 378-79. Although the language of Section 36.16 is broad and is challenged by plaintiffs on the ground of vagueness, resolution of the constitutional defects raised by plaintiffs here would not require

extensive piecemeal state court adjudication. The gravamen of plaintiffs' federal claims may be substantially altered or obviated altogether if the state court resolves two issues of state law: whether the statute creates an irrebuttable presumption against resident classification for students coming to Wisconsin principally for their education and whether the statute authorizes different treatment for males married to female residents than for females married to male residents.

Because it is not clear from the record whether the state law issues are presently being adjudicated in the Wisconsin courts, for the purpose of this motion I shall assume that there is no state court action presently pending. Nonetheless, because of the material ambiguity of the state, I conclude that abstention is warranted despite the cost and delay which may result from plaintiffs repairing to the state courts.

Accordingly, on the basis of the entire record herein and for the reasons stated above, IT IS HEREBY ORDERED THAT this court will retain jurisdiction of this action pending the resolution in the Wisconsin state courts of the issues of state law presented here; IT IS FURTHER ORDERED THAT defendants' motion to stay proceedings is granted.

Entered this 11th day of July, 1973.

BY THE COURT:

/s/ James E. Doyle

District Judge

CERTIFICATE OF SERVICE

I, the undersigned, a member of the Bar of this Court, do hereby certify that on the 31st day of July, 1978, I duly mailed three copies of the Petition for Writ of Certiorari and Appendix to the attorney for the appellees, addressed as follows:

Mr. Daniel W. Hildebrand
Attorney at Law
1 South Pinckney Street
Madison, Wisconsin 53703

/s/
LEROY L. DALTON
Assistant Attorney General
of Wisconsin

Attorney for Petitioners

INDEX TO APPENDIX

Page

DECISION of the United States Court of Appeals for the Seventh Circuit, decided May 4, 1978 101

OPINION AND ORDER of the United States District Court for the Western District of Wisconsin, dated July 30, 1976 123

OPINION AND ORDER of the United States District Court for the Western District of Wisconsin, dated July 11, 1973 125

SUPREME COURT, U.S.
FILED
AUG 24 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-184

PATRICK J. LUCEY, et al.,
Petitioners,

v.

THOMAS E. LISTER, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX AND SYNOPSIS OF ARGUMENT

Page

STATEMENT OF THE CASE 1

REASONS FOR NOT GRANTING CERTIORARI 2

I. Petitioners Seek Review of a Non-Final Judgment 2

II. Petitioners Seek to Involve This Court in an Interpretation of Wisconsin Procedural Law and Present Questions not Presented to the Court of Appeals 2

III. The Decision of the Court of Appeals Does not Conflict With any Decision of This Court 5

IV. No Important Federal Question is Presented 7

V. The District Court Abused its Discretion in Dismissing the Complaint 7

CONCLUSION 8

CASES CITED

American Construction Co. v. Jacksonville T. & K. W. R. Co., 148 U.S. 372 (1893) 2

Page

Baggett v. Bullitt
377 U.S. 360 (1964) 5

Brotherhood of Locomotive Firemen v. Bangor and Aroostook R.R.
389 U.S. 327 (1967) 2

Burford v. Sun Oil Co.
319 U.S. 315 (1943) 6

California v. Taylor
353 U.S. 553 (1957) 4

Colorado River Water Cons. Dist. v. United States
424 U.S. 800 (1976) 6

414 Theatre Corp. v. Murphy
499 F. 2d 1155 (2nd Cir. 1974) 7

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.
240 U.S. 251 (1916) 2

Hancock v. Regents
61 Wis. 2d 484, 213 N.W.2d 45 (1973) 6

Lawn v. United States
355 U.S. 339 (1958) 4

Link v. Wabash R. Co.
370 U.S. 626 (1962) 8

Lister v. Board of Regents
72 Wis. 2d 282, 240 N.W. 2d 610 (1976) ... 3,5

Louisiana Power & Light Co. v. Thibodaux
360 U.S. 25 (1959) 6

Mayor of Philadelphia v. Educational Equality League
415 U.S. 605 (1974) 5

Page

Neely v. Eby Construction Co.
386 U.S. 317 (1967) 4

Railroad Comm'n. v. Pullman Co.
312 U.S. 496 (1941) 5

United Services Life Ins. Co. v. Delaney
328 F. 2d 483 (5th Cir. 1964), *cert. denied*, 377 U.S. 935 (1965) 7

Wisconsin v. Constantineau
400 U.S. 433 (1971) 5

Zablocki v. Redhail
— U.S. —, 98 S.Ct. 673, 54 L.Ed. 2d 618 (1978) 5,6

STATUTE CITED

Wisconsin Statutes
Sec. 36.16 3,6

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STATEMENT OF THE CASE

The facts are correctly stated in the Opinion for the Court of Appeals, 575 F. 2d 1325 (7th Cir. 1978), of which Petitioners seek review in this court. (A. 101-110) We would respectfully direct the Court's attention to the Opinion because it presents a complete discussion of all of the facts rather than relying upon the Statement of the Case set forth in the Petition which, at best, is incomplete.

REASONS FOR NOT GRANTING CERTIORARI

I. Petitioners Seek Review of a Non-Final Judgment.

The record in this case reveals that the complaint was dismissed by the District Court. The Court of Appeals reversed the order dismissing the complaint and remanded the case for trial. The Supreme Court will not grant certiorari to review such a non-final judgment in the absence of some exceptional reasons. *American Construction Co. v. Jacksonville T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893). In *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. 251, 258 (1916), the Court stated that lack of finality of itself alone furnished sufficient ground for the denial of certiorari. In *Brotherhood of Locomotive Firemen v. Bangor and Aroostook R.R.*, 389 U.S. 327 (1967) the Court indicated that because the Court of Appeals remanded the case it was not ripe for review.

Petitioners have failed to show any exceptional circumstances to justify review by this court of a non-final determination by the Court of Appeals.

II. Petitioners Seek To Involve This Court in an Interpretation of Wisconsin Procedural Law And Present Questions Not Presented to The Court of Appeals.

In the Questions Presented and in Section I of the Petition, Petitioners argue that Respondents exceeded the directions of the District Court by joining a cause of action for money had and

received with an action for declaratory relief when their action was brought in the Circuit Court for Dane County, Wisconsin, pursuant to the abstention order of the District Court. They then allege, without citation of any legal authority, that had Respondents asked solely for declaratory relief, it would have been granted by the state courts. The Questions Presented and Petitioner's arguments have no support in fact, are based upon an erroneous view of Wisconsin procedural law and were not presented to the Court of Appeals.

Relating to the facts, Petitioners neglect to inform the court that at the time the action was filed in state court, there were decisions of the Circuit Court for Dane County which recognized that the legislative claim procedure was not required in non-resident tuition cases (Doc. 29, Exh. C). At the time the state action was filed, Respondents sought to obtain not only a declaratory judgment but money damages in order to obtain a complete disposition of the action on state law grounds (Doc. 29, Exh. D). With respect to the claims for declaratory relief in state court, Petitioners argued that there was no case or controversy because the respondents had graduated from the University. With respect to the money damages, they argued that a claim to the Wisconsin Legislature was necessary (Doc. 29, Exh. A and B). In the Wisconsin Supreme Court, Respondents argued that declaratory relief should have been granted pursuant to the District Court's abstention order because the order itself created a case or controversy with respect to the interpretation of Wis. Stats. sec. 36.16 (Doc. 30, pp. 13-14, 25-26). In *Lister v. Board of Regents*, 72 Wis. 2d 282, 305-310, 240 N.W. 2d 610, 623-626 (1976) (Doc. 31, Exh. A), the Wisconsin Supreme Court accepted Petitioners'

arguments, holding that a declaratory judgment could not be obtained because the Respondents had graduated from law school and the only questions remaining would involve money damages.

Petitioners have no support for their argument that had the Respondents sought only declaratory relief in the state courts that such declaratory relief would have been granted. Joinder of the damage claim was not a basis of the state court's refusal to construe the statute. Wisconsin's procedural law is similar to the Federal Rules of Civil Procedure permitting liberal joinder of claims. There is nothing in Wisconsin Rules of Civil Procedure or in the case law of Wisconsin known to the undersigned counsel that would support Petitioners' theory that the Wisconsin courts would have granted declaratory relief to Respondents had they not sought damages in a separate count of the state court complaint. Nor have Petitioners cited any authority to support their theory.

Finally, Petitioners' theory was not presented to the Court of Appeals. Petitioners argued in that Court that Respondents should have presented their claim before the Wisconsin Claims Board and the Legislature, and that the District Court was justified in dismissing the complaint because Respondents made the wrong guess as to how the Wisconsin Courts would rule upon the procedural questions ultimately determined. Thus, this Court should not consider Petitioners' theory since it was not briefed, argued or decided by the Court of Appeals. *California v. Taylor,* 353 U.S. 553, 557 (1957); *Lawn v. United States,* 355 U.S. 339, 362 (1958); *Neely v. Eby Construction Co.,* 386 U.S. 317, 330 (1967). Until filing this Petition for Certiorari, Petitioners did not claim that Respondents could have obtained declaratory relief by omitting the damage claim from the state court complaint.

III. The Decision of The Court of Appeals Does Not Conflict With Any Decision of This Court.

Petitioners' argument of conflict in the decision of the Court of Appeals with decisions of this court is without merit. Petitioners' argument is that respondents caused the delay by requesting money damages in state court instead of confining their complaint to an action for declaratory relief. Petitioners then suggest that delay was the primary factor considered by the Court of Appeals in holding that the District Court should now consider this case on its merits.

The Court of Appeals considered other factors than the delay. These factors include the imposition of the requirement that administrative remedies be exhausted in a civil rights case. The Court of Appeals relied upon statements of the Wisconsin Supreme Court that the case was not important enough for it to use its inherent authority to decide the statutory issues. (App. 113). See *Lister v. Board of Regents,* 72 Wis. 2d 282, 309-10; 240 N.W. 2d 610, 626 (1976). The Court of Appeals also found no basis for the conclusion of the District Court that there was a bona fide question of statutory interpretation. None of these important abstention factors were discussed in the Petition for Certiorari, all of which should be considered in a decision of whether or not to abstain. *Railroad Comm'n. v. Pullman Co.* 312 U.S. 496 (1941); *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605 (1974); *Baggett v. Bullitt,* 377 U.S. 360 (1964); *Wisconsin v. Constantineau,* 400 U.S. 433 (1971); *Zablocki v. Redhail,* — U.S. —, 98 S.Ct. 673, 54 L.Ed. 2d 618 (1978).

Nor is there any interference with the public policy of Wisconsin. As noted by the Wisconsin Supreme Court, this case was not important enough for it to interpret sec. 36.16, Wisconsin Statutes. That statute has now been repealed, and replaced with a materially different statute which governs non-resident tuition. The cases cited by petitioners, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) and *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25 (1959), are totally inopposite as they concern state regulation of oil and gas and eminent domain. As recognized in *Zablocki v. Redhail*, — U.S. —, 98 S.Ct. 673, 54 L.Ed. 2d 618 (1978), and *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 815-16 (1976), there is no doctrine requiring abstention because resolution of a federal question may result in overturning state policy.

Finally, it was Petitioners who caused the delays. Petitioners seek to impose additional delays by suggesting that Respondents appeal the denial of Respondents' claims from the Legislature to the state court. This would not be an effective remedy because the state court has authoritatively construed sec. 36.16, Wis. Stats. to deny similiar claims in *Hancock v. Regents*, 61 Wis. 2d 484, 213 N.W. 2d 45 (1973). Finally, had Petitioners really been interested in obtaining a construction of the statute in state court, they could have waived the Claims Board requirement, or at least joined in Respondents' request that the state courts construe the statute.

IV. No Important Federal Question Is Presented.

The only argument presented in the Petition which has not been considered by this Court are the circumstances which justify vacating an abstention order after the state courts have refused to act. In addition to this case, the question was considered in *United Services Life Ins. Co. v. Delaney*, 328 F. 2d 483 (5th Cir. 1964) *cert. denied*, 377 U.S. 935 (1965), and in *414 Theatre Corp. v. Murphy*, 499 F. 2d 1155 (2nd Cir. 1974). These cases all stand on their particular facts. There is no conflict among the circuit courts, nor any reason to justify the expenditure of this Court's time to set forth more particular guidelines for vacating abstention orders.

Petitioners also argue that they are protected by the Eleventh Amendment and executive immunity. As the Court of Appeals correctly pointed out, these arguments constitute defenses which must be pleaded, proven and considered by the District Court after trial on the merits.

V. The District Court Abused Its Discretion in Dismissing The Complaint.

The record in this case shows that Petitioners have made every effort to obtain adjudication of the state issues in the state courts. These efforts were frustrated in the state courts by procedural decisions which changed the law of Wisconsin as it existed when the state court action was filed. The District Court found that Respondents made their efforts "in good faith" (App. 124). Having made

that determination, it was an abuse of discretion to dismiss the complaint. Unlike *Link v. Wabash R. Co.*, 370 U.S. 626 (1962), there was no disregard by Petitioners or counsel of any orders, scheduling deadlines or other requirements imposed by the rules or by the District Court. Nor are we aware of any authority to sustain dismissal of this action.

CONCLUSION

Respondents respectfully request that the Petition for Certiorari be denied in all respects.

Respectfully submitted,

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